

Pages 1 - 23

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable James Donato, Judge

IN RE GOOGLE PLAY STORE)
ANTITRUST LITIGATION) **NO. 21-md-02981-JD**

THIS DOCUMENT RELATES TO:

Epic Games, Inc. vs. Google LLC,
et al., Case No. 3:20-cv-05671-JD

In Re Google Play Consumer Antitrust
Litigation, Case No. 3:20-cv-05761-JD

State of Utah, et al. v. Google LLC,
et al., Case No. 3:21-cv-05227-JD

Match Group, LLC, et al. vs. Google
LLC, et al., Case No. 3:22-cv-02746-JD

San Francisco, California
Thursday, April 20, 2023

TRANSCRIPT OF PROCEEDINGS

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CSR No. 7445, Official United States Reporter

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Thursday- April 20, 2023

11:06 a.m.

P R O C E E D I N G S

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THE CLERK: Calling Civil 20-5671, Epic Games vs. Google LLC.

Calling Civil 20-5761, In Re Google Play Consumer Antitrust Litigation; Civil 21-5227, State of Utah vs. Google LLC, Multidistrict Litigation 21-2981, In Re Google Play Antitrust Litigation, and Civil 22-2746, Match Group LLC vs. Google LLC.

Counsel? Someone needs to start stating their appearances. Let's start with plaintiffs.

MS. BOYCE: Good morning, Your Honor. My name is Sarah Boyce on behalf of the State of North Carolina.

MS. GIULIANELLI: Good morning. Karma Giulianelli on behalf of consumers.

MR. BORNSTEIN: Good morning, Your Honor. Gary Bornstein for Epic Games.

MR. REITER: Good morning, Your Honor. Joseph Reiter for the Match plaintiffs.

MR. POMERANTZ: Good morning, Your Honor. Glenn Pomerantz on behalf of Google, and with me are my colleagues Kuruvilla Olasa and Justin Raphael.

MR. ROCCA: Good morning, Your Honor. Brian Rocca and Minna Naranjo of Morgan Lewis representing defense.

1 **THE COURT:** Okay. Who's going to take the lead for
2 the plaintiffs?

3 **MS. BOYCE:** I am, Your Honor.

4 **THE COURT:** All right. And for defendant?

5 **MR. POMERANTZ:** I will, Your Honor.

6 **THE COURT:** Okay. You know, we first started getting
7 together in this case -- and looking back to the
8 minutes, minute order entered on May 14th, 2021 -- it's Docket
9 Number 39 -- I let you all know that because we had a mix of
10 injunctive relief and damages claims, that you all needed, the
11 parties, as I said in the minutes, need to begin discussing the
12 sequencing of the MDL member cases for trial. Who's going to
13 go first and how are we going to do that? That was May.

14 Then in July of 2021, I did another minute order, Docket
15 Number 67, where I laid out in substantial, at least conceptual
16 detail what we're going to be doing with the mix of equitable
17 and damages issues, triable by jury, not triable by jury. And
18 I gave you an organizing principle for your discussions, and
19 that is that we will try the jury cases first for all issues
20 common to the legal and equitable claims under Rule 39 and some
21 other authorities; and then after that, I would take up the
22 equitable claims once the jury did its work.

23 So here we are in 2023, April. I don't see any indication
24 that you all have gotten together and constructively planned a
25 sequencing of the trials. What I see happening is people are

1 building silos in opposition to each other and hardening them
2 and not talking.

3 Now, it should be plain as day that there is no
4 Seventh Amendment issue, as Google raised it. I have said from
5 Day One, there will not be multiple jury trials. It's going to
6 be one and done for everything.

7 So I don't know why, Mr. Pomerantz, you're raising some
8 Seventh Amendment concerns about multiple juries. It has never
9 been on the table.

10 We are going to present this in a way that a jury, under
11 the Seventh Amendment, which is our default preference dispute
12 resolution mechanism, as I have emphasized many times in this
13 case, will go first, as Rule 39 provides.

14 Now, here's what I think we ought to do. Someone is going
15 to go to trial in November. That's just happening. Okay? You
16 all are going to figure out what's going to be tried in
17 November and who are the parties going to be.

18 There are people -- there are parties in this room who
19 have nothing to do with class action petitions or anything
20 else. Match, for example; state attorney generals --

21 **MS. BOYCE:** Yes, Your Honor.

22 **THE COURT:** -- Epic.

23 In fact, it's probably the majority of people.

24 So trial is happening, regardless of what
25 Rule 23(f) proceedings may be going on because it's irrelevant

1 to these trials.

2 Now, here's what we're going to do. Who is going to be
3 the lead trial lawyer?

4 Is it you, Mr. Pomerantz? You're going to be the lead
5 trial lawyer for Google?

6 **MR. POMERANTZ:** Yes, Your Honor.

7 **THE COURT:** Who's going to be the lead trial lawyer
8 for Epic?

9 **MR. BORNSTEIN:** That's me, Your Honor.

10 **THE COURT:** All right. Who's going to be the lead
11 trial lawyer for the AGs?

12 **MS. BOYCE:** Brendan Glackin.

13 **MR. GLACKIN:** Me, Your Honor.

14 **THE COURT:** And who's going to be the lead trial
15 lawyer for Match?

16 **MR. REITER:** Not myself, Your Honor. It'll be Doug
17 Dixon.

18 **THE COURT:** Who?

19 **MR. REITER:** Doug --

20 **THE COURT:** I can't hear you. I wasn't saying that
21 because I -- I can't hear you.

22 **MR. REITER:** Apologies, Your Honor. It'll be Douglas
23 Dixon.

24 **THE COURT:** From what firm?

25 **MR. REITER:** Houston Hennigan.

1 **THE COURT:** Which one?

2 **MR. REITER:** Houston Hennigan.

3 **THE COURT:** Houston Hennigan.

4 Okay. And who's going to be the lead lawyer for the
5 consumer class?

6 **MS. GIULIANELLI:** Karma Giulianelli and Hae Sung Nam.

7 **THE COURT:** Both of you.

8 All right. Here's what you're going to do. You, all of
9 you who just appeared as lead trial lawyers are going to get
10 together in person -- in person; same room; no video hookups --
11 in the next two weeks. You pick the location. Doesn't matter
12 to me where. You all pick a location. And you're going to
13 hash out the schedule. Okay?

14 It's happening. You work it out. You know the issues at
15 a much greater level of detail than I do. You're all capable.
16 I know that from your pleadings. You all can handle this.
17 You're all experienced. You set the proposal. All right?

18 So you'll file that a week after you meet. You're going
19 to meet within two weeks. One week after that, you're going to
20 file it.

21 I am going to take a jaundiced and dim view of dueling
22 propositions. I'm expecting agreement. This is -- I'm going
23 to do it myself, which says, there is an area where agreement
24 can be reached. I'm not going to issue an order that is not
25 well grounded in fact and law, as you know.

1 You can do the same thing. So get it done. I want all of
2 the Rule 38, Rule 39 issues parsed out and allocated in some
3 kind of a decision tree, starting with the jury issues first,
4 as the law provides, cascading down to the equitable issues.

5 Now, I'm leaving it up to your discretion. Run with it.
6 Make it happen. Do what you need to do. I'll just give you a
7 couple of thoughts. I've already given you my organizing
8 principle: Jury first.

9 Let's say for Epic, for example, there are common issues
10 of fact and law. You should appear at the trial. I know you
11 don't have claims that are subject to damages; but in any
12 event, you are going to have claims that a jury should decide.

13 So work all these things out. Okay? Now, that's your
14 task.

15 So in effect, the stay motion is denied because -- it's
16 denied in principle because we had to work all this out. Okay?

17 Now, for the consumers, look, I'll just -- you all can sit
18 down.

19 **MR. GLACKIN:** Thank you, Your Honor.

20 **THE COURT:** Here's the thing. I've actually tried a
21 class action as a lawyer, and I have presided over
22 class actions here. You know what the difference is? One jury
23 instruction. There's literally one jury instruction you give
24 in a class action that you do not give in a named plaintiff
25 case.

1 And that one jury instruction, as you may know, just says:
2 This is a class action, and not everybody is required to be
3 here. It really just explains to the jury -- if you're going
4 to come in and say, "Hello, I represent a class of a thousand
5 individuals," it just kind of tells the jury "They're not
6 expected to be here, so don't worry about it."

7 That's it. The proof is the same. The experts are the
8 same. Of course, the damages are different because then you're
9 going to argue for different damages. All right? That's not a
10 negligible fact. I understand that.

11 But 95 percent of a named individual plaintiff versus a
12 class trial, substantively and procedurally, there's no
13 difference.

14 So you two talk about: Why do we have to wait? Okay? I
15 mean, this is a class certification thing. So if you wanted to
16 go ahead with five named individuals, why not? I mean, you can
17 do that and not worry about the 23(f). And then if something
18 happens later, we'll do something. I mean, who knows?

19 Worse that happens is for some reason the certification
20 decision is changed; you have five people. And it may not be a
21 situation the defendant ultimately wants. I've seen this
22 happen in other cases, where you're not going to do it by
23 class; it's going to be death by a thousand cuts. You've got
24 five groups of five and ten people coming over and over and
25 over again with the same claims. Not particularly efficient,

1 but sometimes you have to do it that way.

2 If the certification decision stands -- I might change it
3 myself. I mean, who knows? Proof at trial can often -- not
4 often, but can sometimes raise decertification questions. Then
5 you just sort of upscale the award, and either you settle or
6 you do something else.

7 So it's all solvable, but you need to do it. That's what
8 I've been asking for since 2021.

9 How does that sound, plaintiffs?

10 **MS. GIULIANELLI:** Terrific. Sounds reasonable, and we
11 will do our best, Your Honor.

12 **THE COURT:** Everybody else okay with that?

13 **MR. BORNSTEIN:** Yes, Your Honor.

14 **THE COURT:** Okay. AGs?

15 **MS. BOYCE:** Yes.

16 **THE COURT:** All right. Defendants?

17 **MR. POMERANTZ:** Thank you, Your Honor.

18 I have two requests. First --

19 **THE COURT:** Yes.

20 **MR. POMERANTZ:** -- can we meet by video?

21 I know these people well. We talk often. Ms. Giulianelli
22 lives in Colorado. Mr. Bornstein lives in New York. I would
23 ask, I think on behalf of all of us, if we can do it by video.

24 **THE COURT:** Well, look, I understand. I know
25 everybody -- it's a big case, and everybody's literally all

1 across the United States. I get that. But there is a certain
2 productivity that I think exists when you meet in person.
3 I think the video screens can become an impediment to
4 communication because you're not in the room. So I want you to
5 do it in person.

6 **MR. POMERANTZ:** Your Honor, may I then -- I'll see if
7 this works with everybody.

8 We'll meet immediately after here to at least start our
9 discussion. I will obviously need to talk to my client. I'm
10 sure they need to think about things as well.

11 But if we talk today in person, since we're all here, and
12 then continue the discussion thereafter --

13 **THE COURT:** No. I want a summit. I need a summit.
14 Look, if I hadn't been asking for two years, if I just sort of
15 had this issue, I probably might have been a little bit more
16 receptive. But I feel like I'm barking in the wind a little
17 bit, and it's time for you all now to get this done.

18 **MR. POMERANTZ:** And I would say, on behalf of all of
19 us, again, we actually have been talking about this issue for a
20 good bit. And then the Ninth Circuit created a new situation
21 with granting the 23(f) petition.

22 But I don't want you to think that we have ignored your
23 instructions. I know I have had numerous conversations with
24 several people on the other side about the very topics you're
25 raising now.

1 But we will -- we'll meet in person. We'll have a summit.

2 **THE COURT:** And it's a development that doesn't impact
3 most of the case. So just -- we just have to get this done.
4 All right?

5 **MR. POMERANTZ:** And --

6 **THE COURT:** But no matter what, you definitely and
7 one, two, or three of the people at the other table are going
8 to be in trial in November. Okay? That's just happening. And
9 it is completely divorced from and independent of quibbling
10 over class certification.

11 **MR. POMERANTZ:** And, Your Honor, on that point, I
12 just -- I will not argue it now. I was prepared to argue it,
13 but I won't.

14 But the issues up on appeal affect all of the parties over
15 there, not just one, because they go to the core issue of
16 whether the consumers, the consumers on one side of the market
17 were harmed. And that's part of the *AmEx* two-sided market
18 balancing. It's part of injury-in-fact. And it is not at
19 all -- and antitrust injury. And it's an issue that affects
20 every one of them.

21 **THE COURT:** That may be, but that is, in my view,
22 completely improper to address in a Rule 23 context. Those are
23 substantive issues that have nothing to do with the simple
24 question posed by Rule 23: Does it make sense for this case to
25 proceed by individual plaintiffs, or does it make sense for

1 people to be grouped together?

2 So you have an opening. You want to blow that into some
3 massive tunnel that's going to swallow the case. That's not
4 something I -- I just think that would be a completely
5 erroneous application of the Rule 23 standards.

6 So you can raise that at the end of the case if it doesn't
7 go your way. And who knows? It might. But if it doesn't, you
8 can certainly argue that on appeal, but not on an interim basis
9 for Rule 23. In my view, that would be both improvident and
10 inconsistent with the federal rules.

11 All right. Now, what else can I do to help you make
12 this -- have a productive discussion?

13 **MR. POMERANTZ:** Your Honor, we have a couple --

14 **MR. REITER:** Your Honor?

15 **THE COURT:** Oh, yes. I'm sorry. I interrupted Mr. --

16 **MR. REITER:** If I may, just one minor request.

17 **THE COURT:** Sure.

18 **MR. REITER:** I mentioned that Douglas Dixon will be
19 lead trial counsel for the Match plaintiffs. He's starting a
20 jury trial next week. Happy to do the in-person summit, but
21 I'd ask permission that I can handle that on behalf of the
22 Match plaintiffs.

23 **THE COURT:** Are you going to be the second at the
24 trial?

25 **MR. REITER:** I will be second in command, yes,

1 Your Honor.

2 **THE COURT:** Does anybody have any problem with that?

3 Now, look, here's the deal, though: You can't call Doug.
4 You make the decision in the room. You understand that?

5 **MR. REITER:** Understood, Your Honor

6 **THE COURT:** There'll be no "I have to check with
7 Mr. Dixon" or anything else.

8 **MR. REITER:** Understood.

9 **MR. POMERANTZ:** Your Honor, a couple of other
10 issues --

11 **THE COURT:** Yes.

12 **MR. POMERANTZ:** -- unrelated to the issues here.

13 **THE COURT:** Yes.

14 **MR. POMERANTZ:** So if anybody has any issues related
15 to the stay issue on the order, I -- but otherwise I would
16 turn -- I'd ask Mr. Mach to address one issue that is --

17 **THE COURT:** Before we get there, Mr. Pomerantz, what
18 else can I do to help you -- help everybody make this a
19 successful trial conference? It's a trial summit. It's going
20 to be a trial summit.

21 **MR. POMERANTZ:** I think your guidance was clear. So I
22 will caucus with my team; they'll caucus; and we'll meet.

23 **THE COURT:** All right. Okay.

24 Are you okay, plaintiffs?

25 **MS. GIULIANELLI:** I think that's right.

1 **THE COURT:** Okay. All right. What else do we have?

2 **MR. MACH:** Good morning, Your Honor. Kyle Mach for
3 Google.

4 Google has concerns that the plaintiffs have not complied
5 with the Court's order to trim down the expert disclosures.

6 Your Honor may recall that you previously ordered
7 plaintiffs to coordinate on their experts and designate one
8 expert on each common issue. Then, subsequently, Your Honor
9 ordered the plaintiffs to issue a revised expert list on
10 April 7th.

11 In our view, the plaintiffs have not complied with that.
12 They served an expert list. The expert list is not revised.
13 They have not cut any of the experts from their expert
14 disclosures. And when you look in the detail of the expert
15 disclosures -- pardon me -- that they did issue, there's very
16 substantial overlap where the --

17 **THE COURT:** Let me just jump in. I've never heard --
18 did you all file something about this?

19 **MR. BORNSTEIN:** We did not. I was about to say,
20 Your Honor, we've been meeting and conferring about this as
21 recently as Monday.

22 **THE COURT:** All right.

23 **MR. BORNSTEIN:** We had a communication last night
24 where we were told this might come up. It's why I'm prepared
25 to address it.

1 But my main answer, Your Honor, is we're still meeting and
2 conferring, and there's nothing in front of the Court, and this
3 is complicated.

4 **THE COURT:** It is. I'm just kind of -- so why don't
5 you finish that process. And if you can't work it out, you can
6 come back. That's perfectly fine.

7 **MR. MACH:** That makes sense. Thank you, Your Honor.

8 **THE COURT:** I don't remember all this stuff happening.
9 So you all do what you need to do.

10 Okay. How are things going otherwise?

11 Oh, yes. Go ahead.

12 **MR. POMERANTZ:** We have one other -- again --

13 **THE COURT:** Oh, okay. Sure.

14 **MR. POMERANTZ:** -- I think it's a housekeeping matter
15 that --

16 **THE COURT:** Yes. All right.

17 **MR. POMERANTZ:** I think it's just housekeeping.

18 **MS. NARANJO:** Hi, Your Honor. We just have one
19 housekeeping matter.

20 We filed a joint stipulation. All parties agreed on a
21 sealing process.

22 **THE COURT:** Can you just pull that a little closer to
23 you? Yeah, okay.

24 **MS. NARANJA:** Just this past Monday, all parties filed
25 a joint stipulation related to omnibus sealing procedures for

1 the *Daubert* and dispositive motions.

2 **THE COURT:** Oh, yes. Those are fine.

3 **MS. NARANJA:** Okay. Great. Those are due today; so
4 we just wanted to make sure.

5 **THE COURT:** Right? Those are fine?

6 (Discussion off the record between the law clerk and
7 the Court.)

8 **THE COURT:** Yeah, those are fine.

9 **MS. NARANJA:** Great. Thank you.

10 **THE COURT:** Okay. Good.

11 **MR. BORNSTEIN:** Nothing else from plaintiffs,
12 Your Honor.

13 Ooh, I went too close.

14 **THE COURT:** When is the -- just remind me when the
15 discovery cutoff is.

16 **MR. BORNSTEIN:** Well --

17 **THE COURT:** Is it already done? It's over?

18 **MR. POMERANTZ:** It's done. And there's a few things
19 that are lingering that we're --

20 **THE COURT:** That's fine. You all can do that.

21 Okay. What about the expert stuff? Have you --

22 **MR. POMERANTZ:** The expert discovery will, I think,
23 conclude next week.

24 **MR. BORNSTEIN:** We have one expert left to be deposed
25 on Wednesday, just as a result of some personal scheduling

1 issues that arose with that individual.

2 **THE COURT:** Okay.

3 **MR. POMERANTZ:** And, Your Honor, just so Your Honor is
4 aware, so we will be filing a partial summary judgment motion
5 today. They may be filing something too. That briefing is all
6 set. It'll end in June.

7 **THE COURT:** Okay.

8 **MR. POMERANTZ:** But then Your Honor will have to look
9 at what you have. And we need to discuss a hot tub. You know,
10 do you want one and, if so, when? Which experts? And a date
11 for the oral argument on the motions that were filed, which
12 have been left TBD in your order.

13 So sometime after the --

14 **THE COURT:** I mean, you know my views on summary
15 judgment. It has its place.

16 **MR. POMERANTZ:** We're not seeking -- we're targeted.
17 We're going to be targeted, Your Honor.

18 You have said, I think, in a prior order: You can fillet
19 a case.

20 **THE COURT:** Okay.

21 **MR. POMERANTZ:** But we are not seeking summary
22 judgment --

23 **THE COURT:** Well, Rule 56 says that.

24 **MR. POMERANTZ:** Yeah. Okay.

25 **THE COURT:** I'm merely a conduit for the rules,

1 Mr. Pomerantz.

2 **MR. POMERANTZ:** I'm citing you in this courtroom.

3 **THE COURT:** So can you just tell me? Are you filing
4 it today?

5 **MR. POMERANTZ:** Yeah.

6 **THE COURT:** What's the legal issue that you get --

7 **MR. POMERANTZ:** There's a handful of them, and I'm
8 probably not going to remember all of them. But it has to do
9 with, you know, a duty to deal under *Trinko*. Do we have to
10 offer, you know, competing app stores in our own app store?
11 That's a *Trinko* case that we have a duty to deal with our
12 competitors.

13 There is an issue about tying. And you can just pretty
14 much read what Judge Gonzales --

15 **THE COURT:** Tying?

16 **MR. POMERANTZ:** Tying. The tying claim they have in
17 this case.

18 You can read Judge Gonzalez Rogers' order, and you can see
19 the basis of our argument there. She basically got rid of the
20 tying claim in the *Apple* -- in Epic's case against Apple.

21 And there's, I think, a couple of other arguments that
22 we're making.

23 But what we have done is -- and you'll see it, probably,
24 in the introduction to our motion. We're not seeking summary
25 judgment on the entirety of the case. But we do think there's

1 pieces of the case that should not go to a jury.

2 **THE COURT:** Well, let me -- look, I mean, just on the
3 plaintiff side, be reasonable and rational. If there's
4 something that you just don't want to do or think is an uphill
5 battle and not the main game, think about it. Okay? You don't
6 necessarily have to -- you can work something out if you want;
7 but just don't -- I mean, you don't have to plant your flag on
8 every argument. All right? There is a lot in the complaints.
9 There are clearly some main claims and some less-pointed
10 claims. So when it comes in, take a look at it. If there's
11 something you want to do about that, that would be good.

12 **MR. BORNSTEIN:** We will do, Your Honor.

13 **THE COURT:** If you don't want to, that's fine.

14 But, yeah. Okay.

15 Okay. Great. Thanks a lot.

16 **MR. POMERANTZ:** Thank you, Your Honor.

17 **MR. BORNSTEIN:** Thank you, Your Honor

18 **THE CLERK:** All rise. Court is in recess.

19 (Recess taken at 11:26 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Wednesday, April 26, 2023

Ana Dub

Ana Dub, RMR, RDR, CRR, CCRR, CRG, CCG
CSR No. 7445, Official United States Reporter